

ADA Coordinator Resource Packet

Introduction. Recognizing that the number of disability discrimination claims is increasing, the Division of Risk Management has prepared the attached materials to assist human resource personnel and supervisors in dealing with the issues that arise when an employee makes a request for accommodation. As you utilize these tools, please remember that they are not intended to supplant the need for an individualized approach to each case based on the most current legal advice. Consequently, you should adapt these materials to each unique situation, as you gather information, employ your common sense, and seek counsel from your legal representatives.

Contents. The attached materials have been divided by topics as follows:

- Section 1 – Ask the Right Questions
- Section 2 – Maintain Confidentiality
- Section 3 – Recognize and Route Accommodation Requests
- Section 4 – Gather Information
- Section 5 – Assess the Disability
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- Section 7 – Consider Reasonable Accommodations
- Section 8 – Document the Interactive Process
- Section 9 – Evaluate Direct Threat
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Coverage Reminder. You and your entities are covered under the Risk Management Liability Policy, which contains provisions that are specifically tied to the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973 (Section 504). Coverage is governed by the terms of that policy and this document does not change, alter or supplement that policy in any way. However, as a courtesy, we remind you of the following important points.

Consultation with Risk Management: Claims under the ADA and/or Section 504 may not be covered based on the failure of an insured to provide a requested accommodation unless the insured has met the following conditions: (1) notified Risk Management of its intention not to grant the accommodation; and (2) Risk Management agrees with the denial of the subject accommodation.

Claims for Equitable Relief: Specifically excluded from coverage are claims “based upon, arising from, or in any way related to any request for injunctive relief . . . , job reinstatement, or any equitable remedy.” Because one of the most commonly sought remedies for disability discrimination is job reinstatement, this provision is particularly important to remember.

Accessibility to Buildings and Programs: Also excluded from coverage are “costs incurred . . . to modify or adapt any building, property, program, service or activity in order to make such more accessible or accommodating to any disabled person.” Building and program access are key elements to compliance with the ADA and Section 504. The failure to provide that access may very well result in an uncovered claim to your entity. The most commonly sought remedy for inaccessible buildings and programs is injunctive relief, which, as indicated in the preceding paragraph, is specifically excluded from coverage.

Program Costs or Benefits: The policy further excludes coverage for any “educational program costs or benefits, including expenses, reimbursement, accommodation, or provision of devices, equipment or services, pursuant to IDEA, section 504, ADA or any similar disability law.”

Claim Reporting: Lastly, the policy specifically excludes any damages attributable to any period between the date the named insured becomes aware of an offense, occurrence or incident for which coverage is provided under the policy and the date such offense, occurrence or incident is reported to Risk Management. In short, if you become aware of a potential claim of ADA/Section 504 discrimination or any other Title VII claim of discrimination, you are expected to notify Risk Management immediately so that we can undertake any and all appropriate investigations, mitigate damages, and engage the assistance of the Attorney General’s Office.

Ask Questions. There are many resources from which you can obtain assistance in complying with the ADA and Section 504. One such resource is the Department of Justice ADA Title II Technical Assistance Manual, which is attached hereto. Also helpful are the following websites: www.eeoc.gov, www.usdoj.gov/crt/ada/adahom1.htm, www.wnyc.com/resources/courts/10thcir.hem, www.jan.wvu.edu, www.adainformation.org. Finally, the Division of Risk Management and the Attorney General’s Office continue to be available for compliance consultation.

Section 1 – Ask the Right Questions

A disability-related question is one that is likely to elicit information about an employee's disabling impairments. One of the principle purposes for this proscription is the protection of individuals with hidden disabilities, such as cognitive, mental and emotional impairments. Some general rules are summarized below.

First, an employer cannot pose any disability-related questions to or conduct medical exams of job applicants before a conditional offer of employment; however, an employer can ask all applicants whether they can perform the essential functions of the desired position.

Second, after a *bona fide* conditional offer of employment is extended, and before the individual starts work, an employer may ask disability-related questions and conduct medical exams, but only if the employer follows that practice with all applicants for the subject position.

Third, after an employee commences his or her job, an employer may only ask disability-related questions and conduct medical exams if they are job-related and consistent with business necessity.

Section 2 – Maintain Confidentiality

Importance of Confidentiality. Applicants or employees whose ADA-related health information is inappropriately divulged may bring a claim for the breach of that confidentiality, whether or not they actually qualify for ADA protection. Moreover, it is a breach of confidentiality to request and obtain health information that is not related to the employee's asserted health impairments. All appropriately obtained medical information must be maintained in a confidential file and stored separately from the personnel files. The communication of such information is generally limited to the following situations.

Allowable Disclosures. Supervisors may be told about work restrictions and accommodations, but they may not receive information about the employee's health impairments. First responders, such as first aid and emergency response personnel, may also be informed of an employee's disability if the underlying impairment is likely to require emergency treatment. This exception also applies to employees who have volunteered such information to receive assistance during an emergency evacuation. Disability information may be given to insurers, such as state workers' compensation offices, state second injury funds, or workers' compensation insurance carriers, and governmental officials investigating ADA compliance.

Section 3 – Recognize and Route Accommodation Requests

Recognizing the Request. Generally, when an employee informs an employer that a work adjustment is needed because of a medical condition, the employee has made an accommodation request. Furthermore, accommodation requests can be made by responsible individuals on behalf of the employee, such as health care providers, spouses, and parents. Accommodation requests need not be in writing; nor need they include any magic words, such as “accommodation” or the “ADA”. An employer can require an employee to provide written confirmation of his or her accommodation request; however, the employer should continue to process the request with or without that written confirmation.

Routing the Request. Whenever an employee begins to disclose to a supervisor a health condition or requests an accommodation, the supervisor should immediately and politely direct the employee to the organization’s ADA Coordinator and carefully avoid any further discussion of the matter. This is imperative to avoid potential “regarded as” claims.

Section 4 – Gather Information

Once an accommodation request has been made, the ADA Coordinator has the right and responsibility to gather relevant information for the purpose of determining whether the employee is eligible for ADA protection and any appropriate accommodations. **Critical to the information-gathering process is the development of relevant questions to the employee and his or her health care providers.** The following templates have been developed for your use and adaptation.

Employee Information Form. Also attached is a template which you should adapt for each employee’s situation. Meet with the employee to discuss each question. To assist the employee in completing this form, ensure that the essential and marginal job functions are either attached to or incorporated within the body of this Form.

Letter to Health Care Provider(s). Attached is a template for the employee’s health care providers. Adapt that template to each employee. This should only be used to obtain objective information regarding impairments that are not obvious. Give the employee the copies for each health care provider with instructions that the employee is responsible to facilitate their return. The essential and marginal functions of the employee’s job must be attached to or incorporated within the body of each letter.

Authorization for Use and Disclosure of Health Information. The purpose of this form is to enable you to communicate with the employee’s health care providers and, when appropriate, to gather relevant documentation for submittal to any health care providers you engage to conduct one or more independent medical examinations. You should only utilize this form after it is apparent that the employee has exercised good faith in providing medical documentation to you, and that documentation presents inconsistencies or otherwise precludes you from completing your analysis of the employee’s alleged disability.

Section 5 – Assess the Disability

The Definition. A disability is a physical or mental impairment that *substantially limits* one or more *major life activities*. An individual with a disability is also defined as one who has a “record of” impairment that substantially limits a major life activity, or one who is “regarded as” having an impairment and/or a substantial limitation of one or more major life activities. The ADA Amendments Act (ADAAA) makes clear the Congressional intent to extend broad coverage to individuals with a variety of health issues. As a result of the ADAAA, more people will qualify as an individual with a disability. The principal focus has now shifted from whether an individual qualifies under the ADA for an accommodation to whether the employer has acted reasonably in considering employee accommodation requests.

Assess the Existence of a Current Disability. As implied by the above definition, there are two lines of analysis to this query.

A. Questions about the Impairment.

☐ Does the individual have one or more physical or mental diagnoses of impairment?

☐ If yes, what are the diagnoses?

☐ When did the impairments originate?

☐ How long are the impairments expected to continue?

☐ Identify, by name, address, and phone number, the health care professionals who provided the diagnoses?

B. Questions about Major Life Activities.

Major Life Activities now include the operation of a major bodily functions (bowel, kidney etc.), normal cell growth (cancer), thinking and concentration. Additionally, an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. Diabetes, Epilepsy, MS, and Cancer are examples of episodic impairments. The National Employment Law Institute reports “Interestingly, the ADAAA does not itself discuss whether certain activities such as sexual relations, driving, and using a computer are major life activities. Therefore, it is likely that these activities will continue to be litigated. It is, however, worth noting that the U.S. House of Representatives Committee on Education and Labor Committee Report states that the Committee believes that other major life activities include “interacting with others, writing, engaging in sexual activities, drinking, chewing, swallowing, reaching, and applying fine motor coordination.” H. Rep. No. 110-730, 110th Cong., 2d Sess. (2008).”

1. Which major life activities are alleged to be limited by the relevant impairment(s)?

- | | | |
|---|--|------------------------------------|
| <input type="checkbox"/> Walking | <input type="checkbox"/> Speaking | <input type="checkbox"/> Breathing |
| <input type="checkbox"/> Hearing | <input type="checkbox"/> Seeing | <input type="checkbox"/> Eating |
| <input type="checkbox"/> Sitting | <input type="checkbox"/> Standing | <input type="checkbox"/> Reaching |
| <input type="checkbox"/> Lifting | <input type="checkbox"/> Sleeping | <input type="checkbox"/> Reading |
| <input type="checkbox"/> Learning | <input type="checkbox"/> Concentrating | <input type="checkbox"/> Thinking |
| <input type="checkbox"/> Caring for Oneself | <input type="checkbox"/> Manual Task Function | <input type="checkbox"/> Running |
| <input type="checkbox"/> Reproduction | <input type="checkbox"/> Sexual Function | <input type="checkbox"/> Working |
| <input type="checkbox"/> Bowel Control/Function | <input type="checkbox"/> Interacting with Others | <input type="checkbox"/> Other |

Describe “Other” _____

C. Questions about Substantial Limitations¹ to the Identified Major Life Activities

Ask the employee to provide a descriptive narrative of the impairment including an explanation of the triggers and consequences of or episodic nature of the condition. Have the employee provide examples of the barriers or specific limitations they experience. If the employee narrative does not provide sufficient information to determine whether there is substantial limitation to a major life activity, the employee may complete the following forms. The second form may be useful to understand essential functions of the job needing accommodation. In some cases, it may also be useful for the healthcare provider to complete these forms to address deficiencies or to clarify the medical documentation provided.

¹Currently substantially limited remains undefined. The standard is not as high under the ADAAA. When considering whether a person is substantially limited, ignore the beneficial effects of mitigating measures (except ordinary eyeglasses). At present, compare the individual to the average person in the general population, taking into account the negative effects of any mitigating measures. For example, while one may be restricted from lifting more than 40 pounds, s/he will generally not be considered to be substantially limited in the major life activity of lifting, compared to the average person in the general population.

Please rate how often and to what degree you are substantially limited for each applicable Life Activity.

Major Life Activities Affected	Factual Limitations	How often is this substantially limiting? (Daily, weekly, monthly, etc)	To what degree is this substantially limiting? Scale of 1-10 Mild to Severe	How was this measured?	*Level of Restriction	Factual Ability	What might Improve Ability?	Negative Effects of Mitigating Measures
Bodily Functions (Name Each)								
Bowel/Bladder Control or Function								
Breathing								
Caring for Self								
Concentrating								
Eating								
Hearing								
Interacting with Others								
Learning								
Lifting								
Manual Task Function								
Reaching								
Reading								
Reproduction								
Seeing								
Sitting								
Sleeping								
Speaking								
Standing								
Thinking								
Walking								
Working								
Other								

*Level of Restriction.

No past limitations

Past limitations fully recovered

Mild or intermittent slight symptoms

Slight persisting problems

Moderate persisting problems

Severe persisting problems
 Severe problems with increased symptoms and/or decreased stamina
 Work activity is inappropriate

Please rate how often and to what degree you are substantially limited for each applicable Essential Function.

Job Functions	Factual Limitations	How often is this substantially limiting? (Daily, weekly, monthly, etc)	To what degree is this substantially limiting? Scale of 1-10 Mild to Severe	How was this measured?	*Level of Restriction	Factual Ability	What might Improve Ability?	Negative Effects of Mitigating Measures

*Level of Restriction.

No past limitations
 Past limitations fully recovered
 Mild or intermittent slight symptoms
 Slight persisting problems
 Moderate persisting problems
 Severe persisting problems
 Severe problems with increased symptoms and/or decreased stamina
 Work activity is inappropriate

Assess the “Record of” a Disability. Review any documents in the employer’s possession and control and make the following inquiries.

A. Records about the Impairment.

[] Identify, by date and location, all health records that provide physical or mental diagnoses of the employee?

[] Identify, by name, address, and phone number, each health care professional who provided a diagnosis?

☐ What were the diagnoses?

☐ Date of condition onset?

B. Records about Major Life Activities.

1. Which major life activities were alleged in the above-described records to be limited by the specified impairment(s)?

- | | | |
|---|--|------------------------------------|
| <input type="checkbox"/> Walking | <input type="checkbox"/> Speaking | <input type="checkbox"/> Breathing |
| <input type="checkbox"/> Hearing | <input type="checkbox"/> Seeing | <input type="checkbox"/> Eating |
| <input type="checkbox"/> Sitting | <input type="checkbox"/> Standing | <input type="checkbox"/> Reaching |
| <input type="checkbox"/> Lifting | <input type="checkbox"/> Sleeping | <input type="checkbox"/> Reading |
| <input type="checkbox"/> Learning | <input type="checkbox"/> Concentrating | <input type="checkbox"/> Thinking |
| <input type="checkbox"/> Caring for Oneself | <input type="checkbox"/> Manual Task Function | <input type="checkbox"/> Running |
| <input type="checkbox"/> Reproduction | <input type="checkbox"/> Sexual Function | <input type="checkbox"/> Working |
| <input type="checkbox"/> Bowel Control/Function | <input type="checkbox"/> Interacting with Others | <input type="checkbox"/> Other |

Describe "Other" _____

C. Historical Questions about Substantial Limitations to the Identified Major Life Activities

Major Life Activity ²	Recorded/Historical Limitations	Recorded/Historical Abilities	Recorded/Historical Negative Effects of Mitigating Measures

² If the records assert the employee was substantially limited in the major life activity of working, query about the class or broad range of jobs s/he was unable to perform and the reasons therefore.

Assess if the Employee has been “Regarded As” Disabled.

Interview the employee to gather the following information.

A. Questions about the Impairment.

- ☐ Does the employee claim s/he was “regarded as” having any impairments?
- ☐ If yes, what were the perceived impairments?
- ☐ Date of condition onset?

B. Questions about Major Life Activities.

- ☐ Does the employee claims s/he was “regarded as” limited in one or more major life activities?

- ☐ If yes, which major life activities were wrongly perceived to have been limited?

- | | | |
|---|--|------------------------------------|
| <input type="checkbox"/> Walking | <input type="checkbox"/> Speaking | <input type="checkbox"/> Breathing |
| <input type="checkbox"/> Hearing | <input type="checkbox"/> Seeing | <input type="checkbox"/> Eating |
| <input type="checkbox"/> Sitting | <input type="checkbox"/> Standing | <input type="checkbox"/> Reaching |
| <input type="checkbox"/> Lifting | <input type="checkbox"/> Sleeping | <input type="checkbox"/> Reading |
| <input type="checkbox"/> Learning | <input type="checkbox"/> Concentrating | <input type="checkbox"/> Thinking |
| <input type="checkbox"/> Caring for Oneself | <input type="checkbox"/> Manual Task Function | <input type="checkbox"/> Running |
| <input type="checkbox"/> Reproduction | <input type="checkbox"/> Sexual Function | <input type="checkbox"/> Working |
| <input type="checkbox"/> Bowel Control/Function | <input type="checkbox"/> Interacting with Others | <input type="checkbox"/> Other |

Describe “Other” _____

- ☐ Who had knowledge of the impairment or limitations?
- ☐ Was there a adverse employment action?
- ☐ What was the reason for the action?
- ☐ In what context did the employment action occur?
 - ☐ Application process
 - ☐ Job performance
 - ☐ Benefits/privileges/leave
 - ☐ Post offer employment examination
 - ☐ RIF

- ☐ Inability to perform essential functions
☐ Other

C. Questions about Perceived Limitations to the Identified Major Life Activities

Perceived Limitations to Major Life Activities ³	Employee Observations Supporting Assertion of “Regarded As” Claim

³ If the employee asserts s/he was “regarded as” substantially limited in the major life activity of working, query about the class or broad range of jobs s/he was perceived as unable to perform and the reasons therefore.

Section 6 – Analyze the Qualifications

Being Qualified. In order to be a “qualified” individual with a disability, the employee or applicant must be able to perform the essential functions of the actual or desired position, with or without a reasonable accommodation.

☐ Does the employee/applicant have the required skills, education, licenses, and/or experience for job?

☐ Yes ☐ No

☐ If no, does the employee/applicant believe s/he was denied the position because of a qualification standard that screens him or her out because of a disability?

☐ If yes, what is the qualification standard that is screening out the employee/applicant?

☐ How does the employee/applicant’s alleged disability prevent him or her from meeting the qualification standard?

☐ If the qualification standard actually screens out the employee/applicant, is the standard “job-related and consistent with business necessity”? IN other words, is that qualification standard necessary to perform an essential function or to prevent a direct threat?

☐ What are the actual essential functions of the job? **Job functions must not be confused with the methods of performing** those functions.

☐ What tasks must the employee perform in the position? E.g. answer the telephone, type memos, etc.

☐ List and/or describe all evidence in support of those essential functions

☐ Employer’s judgment (detail)

☐ Written job description (attach)

☐ Amount of time and frequency the function is performed in a given period (day, week, month, year)

☐ Consequences of not performing the function

☐ Experience levels of other employees currently in the same position

☐ Experience levels of employees previously in the same position

☐ Nature of the work

☐ Allegations that past or present employees in the same position have been excused from performing any essential functions.

☐ What are the “marginal” functions of the job?

☐ What evidence or documentation supports that determination

☐ Can the employee/applicant perform the essential functions of the job with or without a reasonable accommodation? ☐ Yes ☐ No

☐ If no, the individual is not “qualified”.

☐ If yes, does the individual need a reasonable accommodation? ☐ Yes ☐ No

☐ If yes, complete the next section with input from the employee/applicant.

Section 7 – Consider Reasonable Accommodations

The ADA requires covered entities not only to avoid discriminatory conduct, but also tasks employers with an affirmative duty to provide reasonable accommodations. A reasonable accommodation is a modification in the workplace that enables an individual with a disability to apply for a job, perform the essential functions of a job, and enjoy job benefits. An accommodation is considered reasonable if it does not impose an undue financial or administrative hardship or result in a direct threat to the employee or others. An employer is not required to provide an accommodation that would result in an undue financial or administrative hardship. Under the ADAAA, the emphasis will be on the employer's efforts to reasonably consider the employee's accommodation request. Once an accommodation is in place, the employee must be advised to contact the ADA Coordinator if the accommodation is not effective or if a new accommodation is necessary.

☐ What is the claimed disability qualification?

- ☐ Individual with a current disability?
- ☐ Individual with a "record of" disability?
- ☐ Individual who was "regarded as" disabled?

☐ Did the employee/applicant request a job modification because of a medical condition? Detail your analysis.

☐ Was the accommodation process initiated because the employer knew the employee/applicant has a disability and has reason to know s/he needs a reasonable accommodation? Detail your analysis.

☐ Which processes are affected by the employee/applicant's accommodation request?

- ☐ Application process
- ☐ Job performance/leave
- ☐ Benefits/privileges

☐ List and describe the accommodations requested by the employee/applicant:

[] List and describe the accommodations suggested by the healthcare provider:

[] List and describe the accommodations suggested by the employer:

[] Is the accommodation needed because of a disability? Detail your analysis.

[] Job Accommodation Network Input:

[] Accommodation(s) Offered/Provided:

Section 8 – Document the Interactive Process

The interactive process is an informal process which should begin as soon as possible once the employer learns that an employee has a disability and is having difficulty performing any part of his or her job. It is important to recognize that there are no “magic words” triggering the interactive process. An employee’s request for leave to see a doctor or to revise duties may qualify as either a request for FMLA or a request for an accommodation. The interactive process includes meetings between the employee and human resource representatives to discuss how the employee’s limitations affect his or her ability to work, and what can be done to keep the employee on the job. The focus should be on how the employee can be helped to perform the essential job functions. The tone of the meeting should always be relaxed and friendly, never reluctant, suspicious or confrontational. Employers are obligated to participate in the interactive process. Failure to do so results in time consuming and expensive consequences including responding to EEOC charges, subjecting the agency to vast oversight, and costly litigation. The interactive process is an ongoing obligation and may require frequent re-evaluation as new information is provided.

☐ Did you engage in an interactive process with the employee/applicant? An interactive process template is attached hereto. Detail your answer.

☐ If you discussed accommodations with the employee/applicant, detail those discussions and attach any notes or documents memorializing those discussions.

☐ From whom did you request assistance in evaluating effective accommodations for the employee/applicant? List all sources and contacts. Detail all such discussions and attach any notes or documents memorializing those discussions.

☐ List all accommodations provided for the employee/applicant.

☐ If you believe providing the requested accommodations would constitute an undue administrative or financial hardship, please answer the following questions in detail:

☐ What are the bases and evidence supporting that belief?

☐ Nature/net cost (considering tax credits, deductions, outside funding)

☐ Overall financial resources of facility

☐ Number of employees at facility

☐ Overall financial resources of entity

☐ Nature of operation (structure, control, workforce, geographical locations, administrative autonomy, relationship of facility to entity)

☐ Impact of accommodation on facility

☐ Impact of accommodation on other employees

☐ Impact on terms of negotiated agreement (school districts)

☐ Describe, list, and attach all documentation supporting your assessment of undue hardship.

Section 9 – Evaluate Direct Threat

A direct threat exists when an individual with a disability poses a *significant risk of substantial harm* to himself, herself, or to others, *and* the employer cannot provide a reasonable accommodation that would ameliorate the level of risk or harm.

☐ Was the employee/applicant screened out for safety-related reasons? ☐ Yes ☐ No

☐ If yes, identify and describe the specific risk.

☐ Provide in detail your analysis of the risk's significance, i.e., is it highly probable?

☐ Provide in detail your understanding of the duration of the risk.

☐ Identify and describe the specific harm associated with the identified risk.

☐ Provide in detail your analysis of the substantial nature of the harm, i.e., seriousness, scope.

☐ Analyze in detail whether the risk or the harm can be reduced by a reasonable accommodation.

☐ Did you engage in an interactive process with the employee/applicant? An interactive process template is attached hereto. Detail your answer.

☐ If you discussed accommodations with the employee/applicant, detail those discussions and attach any notes or documents memorializing those discussions.

☐ From whom did you request assistance in evaluating effective accommodations for the employee/applicant? List all sources and contacts. Detail all such discussions and attach any notes or documents memorializing those discussions.

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☐ Nature/net cost (considering tax credits, deductions, outside funding)

☐ Overall financial resources of facility

☐ Number of employees at facility

☐ Overall financial resources of entity

☐ Nature of operation (structure, control, workforce, geographical locations, administrative autonomy, relationship of facility to entity)

☐ Impact of accommodation on facility

☐ Impact of accommodation on other employees

☐ Impact on terms of negotiated agreement (school districts)

☐ Describe, list, and attach all documentation supporting your assessment of undue hardship.

Section 10 – Avoid Relationship Discrimination Claims

General Rule. The ADA prohibits an employer from discriminating against an employee/applicant because he or she has a relationship with someone who has a disability.

Accommodations. The ADA does not require an employer to grant accommodations to an employee/applicant because he or she has such a relationship.

[] Does the employee/applicant have a relationship or association with someone who has a disability?

[] If yes, describe in detail the nature of the relationship or association.

[] What is the alleged disability of the individual with whom the employee/applicant associates?

[] Describe in detail the nature and extent of all information known by the employer concerning the association/relationship and the corresponding disability.

[] Detail why the employee/applicant believe s/he is being discriminated against because of his or her association or relationship with an individual who has a disability. Attach any supporting documentation.